SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 522

JOSEPH BURSTYN, INC.,

Appellant,

vs.

LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

EPHRAIM S. LONDON,
Counsel for Appellant.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION OF JOSEPH BURSTYN, INC.,

Petitioner-Appellant,

FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE ACT,

against

LEWIS A. WILSON, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, AND JOHN P. MYERS, WILLIAM J. WALLIN, WILLIAM LELAND THOMPSON, GEORGE HOPKINS BOND, W. KINGSLAND MACY, EDWARD R. EASTMAN, WELLES V. MOOT, CAROLINE WERNER GANNETT, ROGER W. STRAUS, DOMINICK F. MAURILLO, JOHN F. BROSMAN, AND JACOB L. HOLTZMANN, AS REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, Petitioner-Appellant submits this statement showing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or order of the Court of Appeals of the State of New York made in this cause on October 18, 1951.

Dates of Judgment Sought to Be Reviewed and of This Appeal

The judgment and order of the Court of Appeals of the State of New York sought to be reviewed affirmed the order of the Appellate Division of the Supreme Court for the Third Judicial Department. The judgment and order of the Court of Appeals and the majority concurring and dissenting opinions of the Judges of that Court were filed on October 18, 1951. The remittitur of the Court of Appeals was issued to the Supreme Court of the State of New York, Albany County on October 18, 1951, and order of remittitur was filed in the Supreme Court of the State of New York, Albany County on November 23, 1951, and by that order, the order and judgment of the Court of Appeals was made the order and judgment of the Supreme Court of the State of New York, Albany County.

The application for appeal to the United States Supreme Court was presented to the Chief Judge of the Court of Appeals of the State of New York on December 5, 1951.

The Court of Appeals of the State of New York is the state court of last resort. Its judgment in this case is final, both in form and substance, and disposes of all of the elements of the controversy in the court below.

Opinion Below

The opinion of the Court of Appeals of the State of New York in this cause has not yet been printed in the official reports. A copy of the opinion is attached hereto as Exhibit A. The opinion of the Appellate Division of the Supreme Court of the State of New York, for the Third Department, in this cause is reported in 278 App. Div. 253, and a copy is attached as Exhibit B.

The Statutory Provision Sustaining Jurisdiction

This cause was instituted to review the Appellees' cancellation of a license issued for the public exhibition of the motion picture The Miracle, and to enjoin the Appellees from interfering with the showing of the film. The Appellees acted under authority purportedly conferred by various sections of the New York State Education Law. Appellant drew into question the validity of the statutes on the ground that they were repugnant to the Constitution of the Unied Sates. The decision of the highest court of the State of New York in this cause was in favor of the validity of the challenged statutes.

The jurisdiction of the Supreme Court of the United States to review the judgment and decree by direct appeal is conferred by Title 28 of the United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court: *Hamilton* v. *Regents of the University of California*, 293 U. S. 245; *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Lovell* v. *City of Griffin*, 303 U. S. 444; *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; *Winters* v. *New York*, 333 U. S. 507.

The Statutes Involved

The validity of the following statutes is involved: New York State Education Law, Sections 120, 122, 129, 131. The statutes prohibit the exhibition of a motion picture film in any theater in the State of New York unless the film is licensed by the Motion Picture Division of the Department of Education or its director. The sections provide for the denial of a license if the Motion Picture Division or its director find a film to be indecent, immoral or sacrilegious. The sanction for exhibition of an unlicensed film is criminal

prosecution. The sections are set out verbatim in Exhibit C.

Appellant contends and contended in this case that the statutes referred to are repugnant to the Constitution of the United States. The decision rendered by the court below was in favor of their validity.

Statement as to the Nature of the Case

This case involves the ban in New York State of the motion picture The Miracle. The ban was effected by the revocation by Appellees of licenses for the exhibition of the film. The statutes, the validity of which is questioned in this appeal, prohibit the exhibition of an unlicensed film in any theaters within the State of New York. Violation of the statute is a criminal offense.

The Miracle was produced in Italy in 1948, and its dialogue is in Italian. It was imported to the United States and was licensed for exhibition as a foreign language film in 1949 (fol. 21). Thereafter Petitioner-Appellant, hereinafter referred to as the Distributor, purchased the American rights to The Miracle, added English subtitles, and combined it with two other films for presentation under the title Ways of Love (fol. 21, 22). The film trilogy Ways of Love received a separate license for exhibition in New York in 1950 (fol. 22).

The film itself is a part of the record on appeal. It is in brief the story of a simple-minded, deeply religious woman who is taken advantage of by a stranger she believes to be St. Joseph. When the woman learns she is with child, she imagines it was immaculately conceived. The picture ends when the child is born.

There is nothing in the dialogue or action or acting in the picture that would suggest that it is to be given any other than a literal meaning, or that it was intended as any-

thing more than the story of the abuse of a deep and simple faith. That was the intent of the writer, the producer, director and professional cast, all of whom are devout Roman Catholics (fol. 203).

The Miracle was first shown in Rome where religious censorship exists, and it was not condemned (fol. 204-206, Exhibits 1-3). The review of the Vatican newspaper L'Osservatore Romano made no criticism on religious grounds (fol. 206, Exhibit 4. When The Miracle was brought to America, it was passed by the U. S. Customs (fol. 206). It was also passed by the Motion Picture Division (the New York State film censorship board) on two separate occasions, first, when the film was separately licensed in 1949, and again in 1950, when licensed as a part of Ways of Love.

After the second license was issued, the Appellant spent a considerable sum for advertising and promoting Ways of Love and in preparing for its exhibition at a first run theater in New York City (fol. 62-3). The film was first shown December 12, 1950, and was an immediate success (fol. 63). It was approved and recommended by the National Board of Review of Motion Pictures (fol. 206), and was thereafter designated the best foreign language film of 1950 by the New York Film Critics (fol. 63-4).

After the picture opened, the Legion of Decency, a Roman Catholic censorship board, initiated a protest against it (fol. 211). The Legion interpreted the picture as a mockery of the immaculate conception of Jesus Christ (fol. 203). Dr. Flick, the director of the Motion Picture Division, was asked to reexamine the film, and after reexamining it, he stated that he did not find it objectionable and refused to take further action (fol. 64-5, 201).

After Dr. Flick refused to take action with respect to the film, his superiors the Appellees, issued an order rescinding the license for The Miracle on the ground that it is sacri-

legious (fol. 56). These proceedings were then instituted to annul the determination of the Appellees, the Regents of the State of New York, and to restrain them from interfering with the exhibition of the film. The proceedings were transferred for disposition to the Appellate Division of the Supreme Court of the State of New York for The Third Judicial Department. That Court confirmed the Regents' determination (fol. 409-14). An appeal from the order of the Appellate Division was taken to the Court of Appeals of the State of New York. The Court of Appeals affirmed the order of the Appellate Division, with two judges dissenting. This appeal is taken from the judgment of the Court of Appeals, which was made in this cause on October 8, 1951. There is no further appeal or proceeding which can be taken in this cause in the courts of the State of New York.

The Constitutional Questions Involved: The Manner in Which the Questions Were Raised and the Decision in Favor of the Validity of the Statutes.

The constitutional questions involved in this appeal are:

(1) Is the statute under which petitioner's film was banned so vague and indefinite and its meaning so uncertain that its enforcement violates the due process clause of the Fourteenth Amendment?

(2) Does the statute as construed violate the constitutional warranty of separate church and state?

(3) Do the statutes infringe the right of free exercise of religion?

(4) Do the statutes impose an unconstitutional restraint on freedom of expression and communication?

The questions were raised in the petition by which the proceedings were initiated. The petition alleges that the

revocation of the license for the exhibition of The Miracle "deprive petitioner of its property rights in the aforesaid licenses without due process of law" and that appellees acted "in violation of the First, Fifth and Fourteenth Amendments of the Constitution of the United States" (fols. 34, 35).

The questions were also raised on the arguments made before, and in the briefs submitted to, the Appellate Division of the Supreme Court of the State of New York (which heard this cause as a court of first instance) and the Court of Appeals of the State of New York. Both courts passed upon the questions raised and both upheld the validity of the statutes.

The majority opinion in the Court of Appeals stated with respect to the question hereinbefore numbered (1):

> "*Second:* To the claim that the statute delegates legislative power without adequate standards, a short answer may be made. Section 122 of the Education Law provides that a license shall be issued for the exhibition of a submitted film, 'unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime.' Only the word 'sacrilegious' is attacked for indefiniteness. The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as, e.g., 'the act of violating or profaning anything sacred' (Funk & Wagnall's New Standard Dictionary, 1937). There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane.'" (Exhibit A at p. 8.)

The dissenting opinion, in discussing that question, stated:

> "The Supreme Court has 'consistently condemned licensing systems which vest in an administrative

official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places' (*Kunz v. New York*, 340 U. S. 290, 294; see, also, *Niemotko v. Maryland, supra*, 340 U. S. 268; *Saia v. New York*, 334 U. S. 558; *Cantwell v. Connecticut*, supra, 310 U. S. 296; *Hague v. C. I. O.*, 307 U. S. 496; *Lovell v. Griffin*, 303 U. S. 444). . . .

"Invasion of the right of free expression must, in short, find justification in some overriding public interest, and the restricting statute must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Feiner v. New York*, supra, 340 U. S. 315, 319; *Niemotko v. Maryland*, supra, 340 U. S. 268; *Winters v. New York*, 333 U. S. 507, 509; *Cantwell v. Connecticut*, supra, 310 U. S. 296, 307-308; *Thornhill v. Alabama*, 310 U. S. 88, 97-98, 105). The statute before us is not one narrowly drawn to meet such a need as that of preserving the public peace or regulating public places. On the contrary, it imposes a general and pervasive restraint on freedom of discussion of religious themes in moving pictures, which cannot be justified on the basis of any substantial interest of the state (Cf. *Kunz v. New York, supra*, 340 U. S. 290; *Dennis v. United States, supra*, 341 U. S. 494, 508-509)." (Exhibit A, at pp. 25-26.)

* * * * * * *

"The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition. So broad, indeed, is the suggested criterion of 'sacrilege' that it might be applied to any fair and temperate treatment of a psychological, ethical, moral or social theme with religious overtones

which some group or other might find offensive to its 'religious beliefs.'" (Exhibit A at p. 29)

The majority opinion in the Court of Appeals stated with respect to the questions hereinbefore numbered (2) and (3):

> "*Fourth:* It is further urged that a license may not be denied or revoked on the ground of sacrilege, because that would require a religious judgment on the part of the censoring authority and thus constitute an interference in religious matters by the State. In this connection, it is also urged that freedom of religion is thereby denied, since one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures. The latter argument is specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment, . . .
>
> "Nor is it true that the Regents must form religious judgments in order to find that a film is sacrilegious . . ." (Exhibit A, pp. 11-12)

The dissenting opinion, in discussing the questions hereinbefore numbered (2) and (3), stated:

> "We are confronted in this case with censorship in its baldest form—a licensing system requiring permission in advance for the exercise of the right to disseminate ideas *via* motion pictures, and committing to the licensor a broad discretion to decide whether that right may be exercised. Insofar as the statute permits the state to censor a moving picture labeled 'sacrilegious,' it offends against the First and Fourteenth Amendments of the Federal Constitution, since it imposes a prior restraint—and, at that, a prior restraint of broad and undefined limits—on freedom of discussion of religious matters. And, beyond that, it may well be that the restraint on the 'sacrilegious' constitutes an attempt to legislate orthodoxy in mat-

ters of religious belief, contrary to the First Amendment's prohibition against laws 'respecting an establishment of religion.' (Cf. *Everson v. Board of Education*, 330 U. S. 1, 15; *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 210). (Exhibit A, at p. 24)

* * * * * * *

"Sincere people of unquestioned good faith may, as in this case, find a moving picture offensive to their religious sensibilities, but that cannot justify a statute which empowers licensing officials to censor the free expression of ideas or beliefs in the field of religion. 'If there is any fixed star in our constitutional constellation,' the Supreme Court has said (*Board of Education v. Barnette*, 319 U. S. 624, 642), 'it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . .'" (Exhibit A, at p. 34)

The majority opinion of the Court of Appeals held with respect to the question numbered (4) herein:

"*Fifth:* Petitioner finally argues that the statute is unconstitutional *in toto;* that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain licenses granted (*Fahey v. Mallonee*, 332 U. S. 245, 255; *Shepherd v. Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits.

* * * * * * *

"Whether motion pictures are *sui generis* or a very special classification of the press becomes a question for the academicians, once it is recognized that there is a danger presented and met by legislation appropriate to protect the public safety, yet narrow enough as not otherwise to limit freedom of expression. If

there is any one proposition for which the free speech cases may be cited from *Schenck* v. *United States* (249 U. S. 47) to *Dennis* v. *United States, and Breard* v. *Alexandria*, decided June 4, 1951, it is that freedom of speech is not absolute, but may be limited when the appropriate occasion arises" (Exhibit A, pp. 14-16)

The dissenting opinion, discussing that question, stated:

"Were we dealing with speeches, with handbills, with newspapers or with books, there could be no doubt as to the unconstitutionality of that portion of the statute here under consideration. The constitutional guarantee of freedom of expression, however, is neither limited to the oral word uttered in the street or the public hall nor restricted to the written phrase printed in newspaper or book. It protects the transmission of ideas and beliefs, whether popular or not, whether orthodox or not. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the 'air-borne voice,' the printed word or the 'still' picture, it is put forward by a 'moving' picture. The First Amendment does not ask whether the medium is visual, acoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If The Constitution deals with substance, not shadows,' if 'Its inhibition was levelled at the thing, not the name' (*Cummings v. Missouri*, 4 Wall. 277, 325), then, surely, its meaning and vitality are not to be conditioned upon the mechanism involved. (Exhibit A, p. 31)

* * * * * * *

"Few would dispute the anomaly of a doctrine that protects as freedom of expression comic books that purvey stories and pictures of 'bloodshed and lust' (see *Winters v. New York, supra*, 333 U. S. 507, 510), light and racy magazine reading (see *Hannegan v. Esquire, Inc., supra*, 327 U. S. 146, 153) and loud-

speaker harangues (see *Saia v. New York, supra*, 334 U. S. 558), and yet denies that same protection to the moving picture." (Exhibit A, at p. 34)

The Questions Involved Are Substantial

I. *The statute under consideration is so vague and indefinite, and its meaning so uncertain, that its enforcement violated the due process clause of the Fourteenth Amendment.* The challenged statutes provide that a film shall be denied a license (i. e., shall not be publicly exhibited) "if . . . *sacrilegious.*" Presentation of a film in a theater without a license is made a penal offense. The word *sacrilegious* is not defined in the statute, or in any rule promulgated by the enforcement agency, and no reported opinion of any court in the United States, prior to that rendered in the instant case, has been found in which the term is construed.

The Court of Appeals in this case defined sacrilegious to mean "the act of violating or profaning anything sacred" (Exhibit A, p. 8), thus fixing the meaning of the statute for the purposes of this case. *Herbert* v. *Louisiana*, 272 U. S. 312, 317; *Skiriotes* v. *Florida*, 313 U. S. 69, 73; *Winters* v. *New York*, 333 U. S. 507, 514. The definition does not delimit the application of the term. "It leaves open the widest conceivable inquiry, the scope of which no one can foresee, the result of which no one can . . . adequately guard against." *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89. What is meant by "anything sacred"? Are only tangible things such as physical symbols, icons, the Cross of Jesus, the Star of David, included, or does the term also embrace ideas, beliefs, customs, ceremonies? What acts of violation or profanation are within the purview of the statute? Are expressions of disbelief included? In the dissenting opinion in this case, Judges Fuld and Dye also ask, "At what point, . . . does a search for the

eternal verities, a questioning of particular religious dogma, take on the aspect of 'sacrilege'? At what point does expression or portrayal of a doubt of some religious tenet become 'sacrilegious'? Not even authorities or students in the field of religion will have a definite answer, and certainly not the same answer" (Exhibit A, p. 27).

In the absence of any judicial construction of the word "sacrilegious" and the creation of any standards, it is impossible to determine in advance what is prohibited and what is permitted by statute. As Judge Fuld wrote herein, "In the very nature of things, what is 'sacrilegious,' will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is 'sacrilegious' or not, must necessarily rest in the undiscoverable recesses of the official's mind" (Exhibit A, p. 27).

The statutes, as construed in this case, thus empowered the appellees to prohibit the showing of a film if according to their own convictions it violated anything which they deemed sacred. The complete absence of criteria of application compelled those charged with enforcement of the law to determine the extent and scope of their powers, and the circumstances under which the powers could be exercised. The negative exercise of the powers conferred by the statute results in the deprivation of substantial property rights (i.e. the right to exhibit a film for profit) and possible criminal prosecution. The repugnance of the statute to the Fourteenth Amendment would therefore seem clear.

II. *The statute as construed violates the constitutional warrants of separate church and state and of freedom of religion.* The court below held that the statute was intended to prevent offense against religion. If so, it is a law to aid religions directly within the ban of the First and Fourteenth Amendments. The fact that the section purports to protect

all faiths against sacrilege is not controlling. The same point was urged and rejected in *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203. The Constitutional Amendments forbid not only the preference of one religion over another, but also impartial assistance to all religions. *Everson* v. *Board of Education*, 330 U. S. 1, 59; *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 210.

The Appellate Division of the Supreme Court conceded in its opinion below that any construction of the statute "which denotes a preference for one sect would be inconsistent with the constitutional mandate of complete separation of Church and State." Unquestionably such a preference was indicated in this case. A minority group within the Roman Catholic Church found The Miracle sacrilegious. Leaders and ministers of Episcopalian, Presbyterian, Congregationalist, Unitarian, Evangelical and Reformed Churches found the film deeply religious (fols. 208-9, Exhibits 6-35). All Protestant ministers who expressed themselves publicly found that the film was not sacrilegious (see Exhibit A, at p. 20). In holding The Miracle sacrilegious, the Regents thus were adopting and enforcing the opinion of one segment of a religious group as opposed to that of many others.

The statute, in directing the Regents and the censors to determine whether a film is sacrilegious, requires the officials to make a purely religious judgment—and such judgment is made the basis for official action. Obviously nothing may be held sacrilegious unless judged according to a particular religious doctrine. As the Regents asserted in this case, "anything is only sacrilegious to those persons who hold the concept sacred" (Exhibit A, at p. 28). The authorities charged with enforcement of the statute must therefore adopt some religious dogma as a standard for action.

The official sanction of any religious doctrine and its enforcement by government authority is patently a breach of the 'wall between Church and State.' *Cantwell* v. *Connecticut*, 310 U. S. 296, 305.

The Miracle was banned because, it was thought to be a "visual caricature of religious beliefs held sacred" (Exhibit A, p. 12). Caricature is but an expression of disapproval or disagreement. The Constitutional guaranty of the free exercise of religion extends to the profession of religious belief. *Cantwell* v. *Connecticut*, 310 U.S. 296; *People ex rel McCollum* v. *Board of Education*, 333 U.S. 203, 210. The freedom to express disbelief is not limited to any particular form or method or medium. Nor may any expression of disbelief be suppressed because it offends the sensibilities, or insults the cherished doctrine, of any religious group. *Cantwell v. Connecticut*, 310 U.S. 296; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 116; *Kunz* v. *New York*, 340 U.S. 290.

III. *The statutes impose an unconstitutional restraint on freedom of expression and communication.* Unquestionably, if talking pictures are a medium of communication within the protection of the First and Fourteenth Amendments, the statute under consideration is unconstitutional and void on its face. The statute provides for inspection and licensing of films before they can be publicly shown. It authorizes the censors to determine which films may and which may not be seen. Any statute which requires permission in advance to exercise the right to publish and invests in the licensor discretion to determine whether the right may or may not be exercised, violates the constitutional guaranties of freedom of the press. *Near* v. *Minnesota*, 283 U. S. 697, 713-716; *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Lovell* v. *Griffin*, (1938) 303 U. S. 444, 451-452.

The court below, relying on *Mutual Film Corp.* v. *Indus-*

trial Commission of Ohio, 236 U. S. 230 (1915), held that as motion pictures are primarily entertainment, they are not a medium of communication within the protection of the First and Fourteenth Amendments. It will be noted that three of the seven judges of the court dissented from that view. Judge Desmond, in his concurring opinion, stated that, "Motion pictures are . . . not excluded from First Amendment coverage (*United States* v. *Paramount Pictures*, 334 U. S. 131, 156)." He found, however, that the sacrilege in The Miracle might "incite an immediate breach of the peace" and therefore could be constitutionally suppressed (Exhibit A, p. 19). Possible incitement of disorder was not the basis for suppression of the film in this case and is not the basis for the censorship provided for by the statute. In addition, the film has been shown extensively in various parts of the United States (including Washington, D. C.), and at no time and in no place incited any breach of the peace.

There is, therefore, no warrant or justification for the suppression of The Miracle on the ground that its exhibition tended to incite an immediate breach of the peace. Nor can the statute be sustained on that ground for, under the statute as construed, the preservation of the peace is not the basis for official action. The statute involves the exhibition of films for profit. Admission must be paid for the privilege of viewing the film. As the opinions expressed in films are not imposed upon their audience, it is difficult to conceive how they may be suppressed on the ground of tendency to incite to disorder.

The *Mutual Film* case, as Judge Fuld remarked, should be relegated to the history shelf (Exhibit A, p. 33). Since the time it was rendered in 1915, its underlying reasoning has been held erroneous, and its authority has been so impaired that the case may no longer be considered controlling. The

United States Supreme Court recently indicated fundamental disagreement with the principle of the *Mutual Film* case, in its dictum in *United States* v. *Paramount Pictures*, 334 U. S. 131, 66, "We have no doubt that moving pictures like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment." See also *Kovacs* v. *Cooper*, 336 U. S. 77, 102.

The *Mutual Film* case held that motion picture films are not an instrument for the publication of ideas, because motion pictures were "a business pure and simple", and were intended primarily for entertainment. The Supreme Court has since held that neither reason justifies the denial of freedom of speech and press. In *Grosjean* v. *American Press* (1936), 297 U. S. 233, it rejected the proposition that the right of free speech should be denied corporate enterprises engaged in business for profit. See also *Thomas* v. *Collins*, 323 U. S. 516, 531. Since the *Mutual Film* case, *supra*, was decided, the Supreme Court also repudiated the idea that freedom of press may be denied publications intended primarily for entertainment. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *Winters* v. *New York*, 333 U. S. 507.

The court, in the *Mutual Film* case, concerned itself solely with the question of whether the statute violated the Ohio Constitution. It was not until 1925, ten years after the decision in the *Mutual Film* case, that the provisions of the First Amendment relating to free speech and press were held applicable to State Legislation. That doctrine was first enunciated in 1925 in *Gitlow* v. *New York*, 268 U.S. 652, cf. also *Near* v. *Minnesota*, 283 U.S. 697, 722, 723. The *Mutual Film* case, therefore, cannot be considered as authority for the proposition that motion pictures must be denied the protection of the First (and Fourteenth) Amendments of the United States Constitution.

To contend, as did the court below, that movies are still merely spectacles and not a form of communication,

is to ignore the very significant changes that have occurred in the past 36 years. When the *Mutual Film* case was decided in 1915, the moving picture industry was in its infancy. That was the day of the nickelodeon, when most pictures were still in single reels (Terry Ramsaye, The Annals of the American Academy of Political & Social Science, Nov., 1947, pp. 4, 5). Movies were then a trivial form of entertainment without significance. The profound influence of the movies on the mores and thinking of the civilized world at the present time is undeniable.

The contention that Petitioner-Appellant, having sought a license pursuant to the statutes, is estopped from denying their validity as a violation of the right of free press is without merit. If that contention were valid, then Petitioner's only means of testing the validity of the law in question (it having been on the statute books for some years) would have been to ignore its provisions and risk criminal prosecution. "One who is willing to obey a statute and invoke its provisions by applying thereunder for a license to do business is quite free, when his application is denied, to enjoin the operation of the statute on the ground that it may not constitutionally require any license at all." *Buck v. Kuykendall*, 267 U.S. 307, 316. See also *O'Brien* v. *Wheelock*, 184 U.S. 450, 489; *Union Pacific R.R. Co.* v. *Public Service Comm.*, 248 U.S. 67, 69; *Abie State Bank* v. *Bryan*, 282 U.S. 765, 776; *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 166.

IV. The importance of the question is too evident to warrant any lengthy discussion. The cinema is perhaps our most vigorous art form, and, to quote a U.S. Senate Resolution (152), one of "the most potent instruments of communication of ideas." It is intolerable that the millions of film goers in New York State should be deprived of the right to view films dealing with religion because the views

expressed in the film conflict with those of a minority of a religious group. If the standards applied by the censors in this case were applied to literature, a great number of the world's masterpieces would be suppressed. The book burning would include works of John Milton, Francis Bacon, Jeremy Bentham, Thomas Hobbes, John Locke, John Stuart Mill, Addison and Steele, Oliver Goldsmith, Immanuel Kant, Maimonides, Spinoza, Sterne, Swedenborg, Balzac, Bergson, Cato, Comte, Benedetto Croce, D'Annunzio, Daudet, Defoe, Descartes, Diderot, Dumas (father and son), Hugo, Grotius, Flaubert, De la Fontaine, Anatole France, Edward Gibbon, Voltaire, Heine, Hugo, David Hume, Maeterlinck, Montaigne, Montesquieu, Pascal, Racine, Renan, Rousseau, Stendahl, Zola, to mention but a very few of the classics proscribed by the Index Librorum Prohibitorum (1940) on the ground that they violate or profane sacred doctrine.* The extent to which political progress would have been impeded, and literature, philosophy and jurisprudence would have been impoverished, had the proscription of those writings been effective, is fortunately merely a matter for speculation. The repression of motion pictures as media for the dissemination of ideas will be a real and immediate danger if the statutes permitting censorship of films on religious grounds are sustained.

WHEREFORE, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance, and the appeal in the above entitled cause comes within the proper jurisdiction of this Court.

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* The writings banned under the General Index for the same reason are legion.

EXHIBIT A

Opinion of Court of Appeals, Concurring Opinion and Dissenting Opinion

FROESSEL, J:

A license for the exhibition of a motion picture film entitled "The Miracle" together with two other films, described in their combination as a trilogy and called "Ways of Love," was issued to petitioner on November 30, 1950, by the motion picture division of the Department of Education of the State of New York, under the governing statute (Education Law, art. 3, part II). "The Miracle" was produced in Italy as "Il Miracolo," and English subtitles were later added. A prior license has been issued to the original owner of the distribution rights for exhibition, with Italian subtitles alone, but the film was never shown under that license.

The first public exhibition of "The Miracle" as part of the trilogy, "Ways of Love," was shown in New York City on December 12, 1950. It provided an immediate and substantial public controversy, and the Education Department was fairly flooded with protests against its exhibition. Others expressed a contrary view. In consequence thereof, the Board of Regents of the University of the State of New York (hereinafter called the Regents) proceeded promptly to review the action of its motion picture division. It appointed a subcommittee, and directed a hearing requiring petitioner to show cause why the licenses should not be rescinded and cancelled.

After viewing the film and giving petitioner an opportunity to be heard, its subcommittee reported that there was basis for the claim that the picture is sacrilegious, and recommended that the regents view the film. Petitioner declined to participate in the hearing other than to appear specially before the subcommittee for the purpose of challenging the jurisdiction of the Regents to cancel the licenses, but its sole stockholder, Joseph Burstyn, appeared as an individual and filed a brief.

Thereupon and on February 16, 1951, after reviewing the picture and the entire record, the Regents unanimously adopted a resolution rescinding and canceling the licenses upon their determination that "The Miracle" is sacrilegious, and not entitled to a license under the law. Thereafter petitioner instituted the present Article 78 proceeding to review that determination, and now urges that (1) the Regents were powerless to review the action of its motion picture division or to revoke the licenses; (2) the word "sacrilegious" does not provide a sufficiently definite standard for action; (3) the Regents exceeded their authority; (4) the statute is unconstitutional as in violation of the First and Fourteenth Amendments of the Constitution of the United States in that denial or revocation of a license on account of sacrilege interferes with religious liberty and breaches the wall between church and state; and (5) the statute is unconstitutional *in toto* as a prior restraint on the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution. The Appellate Division unanimously confirmed the determination of the Regents.

First: The principal argument advanced by petitioner is directed toward the claim that the Regents have no power under the statute to rescind a license once issued by the motion picture division, unless upon a charge of fraud in the procurement thereof or subsequent misconduct by the licensee. Any other construction of the statute, it is said, would be inequitable to petitioner, which has spent money relying upon the license as issued. The Regents, on the other hand, contend that they were empowered under the Education Law and our State Constitution to make the determination here challenged.

This issue, then, is one primarily of statutory construction, turning upon the intention of the Legislature as found in the language of the statutes. It is resolved by the answer to the question: Did the Legislature intend that the granting of a license by a subordinate official of the State Education Department should be a determination final and irrevocable, binding on the head of his department, the courts and the public for all time? As we said in *Matter of*

Equitable Trust Co. v. *Hamilton* (226 N. Y. 241, 245), "That is in every case a question dependent for its answer upon the scheme of the statute by which power is conferred."

In considering the statute pattern conferring the power, we should note the framework of fact and circumstance in which the statutes are to be examined, and particularly the nature of the problem with which we are dealing. Motion pictures, by their very nature, present a unique problem. They are primarily entertainment, rather than the expression of ideas, and are engaged in for profit (*Mutual Film Corp.* v. *Industrial Commission of Ohio*, two cases, 236 U. S. 230, 247; *Mutual Film Corp.* v. *Hodges*, 236 U. S. 248). They have universal appeal to literate and illiterate, young and old, of all classes. They may exercise influence for good, but their potentiality for evil, especially among the young, is boundless. As was said in *Pathe Exchange, Inc.* v. *Cobb* (202 App. Div. 450, 457, affd. 235 N. Y. 539), where we sustained the original statute (L. 1921, ch. 715) creating the "motion picture commission," in respect to current events films: "* * * many would cast discretion and self-control to the winds, without restraint, social or moral. There are those who would give unrestrained rein to passion. * * * They appreciate the business advantage of depicting the evil and voluptuous thing with the poisonous charm." A public showing of an obscene, indecent, immoral or sacrilegious film may do incalculable harm, and the State, in making provision against the threat of such harm (Education Law, sec. 122), may afford protection as broad as the danger presented.

We are thus concerned with a valid exercise of the police power (*Mutual Film* cases, *supra*; annotation 64 A. L. R. 505, and cases therein cited; *Pathe Exchange, Inc.*, v. *Cobb*, *supra*) and with rights acquired by licensees thereunder. Such rights are not contractual in the constitutional sense (*People ex rel. Lodes* v. *Dept. of Health, etc.*, 189 N. Y. 187; 12 Am. Jur., Constitutional Law, sec. 405; 33 Am. Jur., Licenses, secs. 21, 65). This is the general rule notwithstanding the expenditure of money by a licensee in reliance upon the license, although there is authority to the contrary in the case of building permits (33 Am. Jur.,

Licenses, sec. 21; People ex rel. *Lodes* v. *Department of Health, etc., supra,* distinguishing at p. 196, *City of Buffalo* v. *Chadeayne,* 134 N. Y. 163). Moreover, rights gained under the statute are accepted with whatever conditions or reservations the statute may attach to them. With these precepts in mind, and in the light of the problem with which the Legislature dealt, we may properly turn to a consideration of the statutory scheme.

The original body for the licensing of motion pictures for exhibition in this State was an independent commission created by chapter 715 of the Laws of 1921, its members appointed by the Governor, by and with the advice and consent of the Senate. While the provisions for licensing were similar to those now in the Education Law, there was an essential difference in the scheme embodied therein due to the *independent* nature of the former commission, which was then expressly given all of the powers now granted to the Regents. In 1926, the functions of the motion picture commission were transferred to the Department of Education and the old commission was abolished (L. 1926, ch. 544; State Departments Law, sec. 312). In 1927, the present form of the statute was incorporated into the Education Law as article 43 thereof (L. 1927, ch. 153, secs. 28, 29). These changes were significant as will presently more fully appear.

The Regents are a constitutional body, existing since 1784 (N. Y. Const., art. XI, sec. 2). They are named as head of the education department in the same paragraph as are the three chief elective officers of the State, the Governor, Comptroller and Attorney-General (art. V, sec. 4). The latter provision of our Constitution empowers the Regents to "appoint and at their pleasure remove a commissioner of education to be the chief administrative officer of the department." The mere placing of the motion picture commission in the department of education indicates an intention that the Regents should henceforth exercise complete authority over that agency.

Moreover, by explicit language, the Legislature gave to the Regents as head of the education department all of the broad powers of control and supervision formerly pos-

sessed by the independent commission, leaving to the motion picture division only "the administrative work" of licensing (Education Law, secs. 101, 103, 132). Thus by section 101, of the Education Law, the education department "is charged" with "the exercise of all the functions" of the department, and with "the performance of all" the "powers and duties" transferred from the former independent motion picture division, "whether in terms vested in such department" or in any "*division*" thereof. (Emphasis supplied.) And such performance is authorized "by or through" the appropriate officer or division; by the same section the Regents are continued as "the head of the department," as prescribed in the Constitution. The Regents appoint the director, officers and employees of the motion picture division, fix their compensation, assign duties to the division, establish local offices, and "prescribes the powers and duties" (Education Law, secs. 120, 121). The "form, manner and substance" of license applications are prescribed by the education department, and not by the motion picture division (Education Law, sec. 127).

The Regents must review the *denial* of a license before an unsuccessful applicant, who is given a "right of review by the regents," can avail himself of an article 78 proceeding (Education Law, sec. 124). A corresponding right of review where a license was *issued* must be deemed implicit in the broad powers of the board, rendering needless any additional language by way of express grant; when the Legislature intends to withhold the power of review from the head of a department with respect to the finding of an agency of the department, it does so by express language (Labor Law, Labor Relations, sec. 702, subd. 9; Workmen's Compensation Law, sec. 142, subd. 4). Finally, the Regents "have *authority* to enforce the *provisions* and *purposes*" of the statute and to make rules and regulations in "carrying out the enforcing (its) *purposes*" (Education Law, sec. 132; emphasis supplied). This latter provision is taken directly from the original statute (sec. 15), and, although not embraced in the 1926 enactment transferring functions of the independent motion picture commission, this precise authority was expressly given to the Regents by the 1927

amendment (former sec. 1092 of the Education Law). The power to enforce embraces the power to correct the action of a subordinate, and one of the specific provisions and purposes of the act is that no sacrilegious films be licensed.

From all of this it is clear that the motion picture division is subject and subordinate to the education department and the Regents, and is not independent thereof (*cf. Butterworth* v. *United States*, 112 U. S. 50, in which an altogether different statute pattern was involved, and where an appeal was expressly authorized from the commissioner to the court, either directly or by means of an original suit in equity). Even such functions as may now be exercised by the director of the division under the statute may be exercised by other officials upon authorization by the Regents (Education Law, secs. 120, 122). Without question, then, the statute constitutes the Regents the mainspring of the entire system therein set up. To deny them the power to correct the action of a subordinate, when the ultimate responsibility rests upon them, would be to set at naught the whole elaborate plan established by the Legislature. Such power is "essential to the exercise" of the powers expressly granted (*Lawrence Constr. Corp.* v. *Sate of New York*, 293 N. Y. 634, 639).

If petitioner's interpretation of the Education Law were to be adopted, no review either of an administrative or supervisory nature, or through the civil or criminal courts (see Penal Law, sec. 1141, as amended by L. 1950, ch. 624; *Hughes Tool Co.* v. *Fielding*, 188 Misc. 942, affd. 272 App. Div. 1048, affd. 297 N. Y. 1024), of the action of a subordinate granting a license in the first instance as provided by the Legislature. Thus, the most indecent, obscene, immoral, sacrilegious or depraved presentation might be made through the medium of motion picture film, provided only there was some slip, inadvertence or mistake on the part of the reviewer, leaving his superiors, the courts, and the public generally powerless to correct the situation. It would simply mean that this statutory plan to protect the public from films forbidden to be licensed for general exhibition under section 122 rests entirely upon the judgment of one or two persons in the motion picture division,

whose favorable determination in the first instance is irrevocably binding on the People of the State of New York. Such intention on the part of the Legislature would seem to be so utterly unreasonable and out of harmony with basic public policy in these matters as to be unthinkable (*People* v. *Ahearn*, 196 N. Y. 221, 227).

On the other hand, the only reasonable view to be taken is that the Legislature deemed the Constitution and the Education Law vested in the Regents as an independent constitutional body such supervisory powers as sufficiently to protect the public interest against improper action by subordinates, and that the authority thereby granted is therefore sufficiently complete in itself to accomplish the salutary purposes envisioned therein. Once the Legislature placed the power to license in the department of education, the Constitution (art. V, sec. 4) mandated the Board of Regents as its head to exercise it, and there is no legislation even purporting to restrict them from doing so. They are authorized to employ subordinates and to function "by or through them," but are not thereby divested of their own ultimate responsibility. The action of the motion picture division must thus be regarded as reviewable by the Regents in any case—where the license is refused, on demand of the applicant; where the license is granted, on the Regents' own motion.

Accordingly, we are of the opinion that the Regents have power to review the action of its motion picture division in granting a license to exhibit motion pictures, and rightfully exercised its jurisdiction in this case.

Second: To the claim that the statute delegates legislative power without adequate standards, a short answer may be made. Section 122 of the Education Law provides that a license shall be issued for the exhibition of a submitted film, "unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." Only the word "sacrilegious" is attacked for indefiniteness. The dictionary, however, furnishes a clear definition thereof, were it necessary to seek one, as, e. g., "the act of violating or profaning anything secred" (Funk

& Wagnell's New Standard Dictionary, 1937). There is no difficulty in recognizing the limits of the criterion thus established, and the courts have had no problem either with the word "sacrilegious" or with its synonym, "profane."

In *Mutual Film Corp.* v. *Hodges* (236 U. S. 248, *supra*), the contention that there was an invalid delegation of legislative power was rejected where the statute provided that the censor should approve such films as were found to be "moral and proper, and disapprove such as are *sacrilegious*, obscene, indecent, or immoral, or such as tend to corrupt the morals" (emphasis supplied). In *Winters* v. *New York* (333 U. S. 507, 510) it is stated that publications are "subject to control if they are lewd, indecent, obscene or *profane*" (emphasis supplied). In *Chaplinsky* v. *New Hampshire* (315 U. S. 568, 571-572) Mr. Justice Murphy declared for a unanimous court: "There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the *profane* * * *" (emphasis supplied). Indeed, Congress itself has found in the word "profane" a useful standard for both administrative and criminal sanctions against those uttering profane language or meaning by means of radio (*Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 156, certiorari denied, 340 U. S. 929; U. S. Code, tit. 47, Annotated, sec. 303, m, D; U. S. Code, tit. 18, Annotated, sec. 1464; see, also, Penal Law, sec. 2072).

Accordingly, the claim that the word "sacrilegious" does not provide a sufficiently definite standard may be passed without further consideration, since it is without substance.

Third: We turn now to the contention that the Regents exceeded their powers.

Petitioner urges that, even if the board had the power, there was no justification for revocation. Of course, as the Appellate Division below, in its opinion, said: "Under the familiar rule, applicable to all administrative proceedings, we may not interfere unless the determination made was one that no reasonable mind could reach." This rule applies to the courts and not to administrative agencies, as

the Regents. (*Matter of Foy Productions, Ltd.* v. *Graves*, 253 App. Div. 475, affd. 278 N. Y. 498.)

We have all viewed the film in question. The so-called exhibits, which are simply unsworn communications expressing personal opinions, are of little help to us. The principal basis for the charge of sacrilege is found in the picture itself, the personalities involved, the use of scriptural passages as a background for the portrayal of the characters, and their actions, together with other portions of the script and the title of the film itself. It is featured as a "way of love." At the very outset, we are given this definition: "ardent affection, passionate attachment, men's adoration of God, sexual passion, gratification, devotion."

While the film in question is called "The Miracle," no miracle is shown; on the contrary, we have the picture of a demented peasant girl meeting a complete stranger whom she addresses as "Saint Joseph". At the very beginning of the script, reference is made to "Jesus, Joseph, Mary". "Saint Joseph" first causes her to become intoxicated. Scriptural passages referring to the Holy Sacrament (Luke 22:19), and to the nativity of Christ (Matt. 1:20), are freely employed immediately after she states she is not well. A blackout in the film, in its association with the story, compels the inference that sexual intercourse and conception ensue. "Saint Joseph" abandons her immediately following the seduction, she is later found pregnant, and a mock religious procession is staged in her honor; she is "crowned" with an old washbasin, is thrown out by her former lover, and the picture concludes with a realistic portrayal of her labor pains and the birth in a church courtyard of her child, whom she addresses as "my blessed son", "My holy son".

Christ is the heart and core of the Christian faith. Two personalities most closely related to Him in life were His mother, Mary, and Joseph. They are deeply revered by all Christians. Countless millions, over the centuries have regarded their relationship as sacred, and so do millions living today. "The Miracle" not only encroaches upon this sacred relationship and the Biblical presentation thereof in respect to the birth of Christ, but utterly destroys it, associ-

ating it, as the Regents found, "with drunkenness, seduction, mockery and lewdness", and, in the language of the script itself, "with passionate attachment, sexual passion and gratification", as a way of love.

In the light of the foregoing, we conclude, as did the Appellate Division, that we cannot say that the determination complained of "was one that no reasonable mind could reach"; and that the board did not act arbitrarily or capriciously.

Fourth: It is further urged that a license may not be denied or revoked on the ground of sacrilege, because that would require a religious judgment on the part of the censoring authority and thus constitute an interference in religious matters by the State. In this connection, it is also urged that freedom of religion is thereby denied, since one man's sacrilege is another man's dogma, and one may thus be prevented from propagating his own religious views by means of motion pictures. The latter argument is specious when applied to motion pictures offered to the public for general exhibition as a form of entertainment, as we shall hereafter point out. Religious presentations, as ordinarily understood, as well as other educational and scientific films, are exempt (Education Law, sec. 123). Thus freedom of religion is not impaired in the slightest, as anyone may express any religious or anti-religious sentiment he chooses through a proper use of the films.

Nor is it true that the Regents must form religious judgments in order to find that a film is sacrilegious. As hereinbefore indicated, there is nothing mysterious about the standard to be applied. It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule to the extent that it has been here, by those engaged in selling entertainment by way of motion pictures. As the court below said of the statute in question, "All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom.

Although it is claimed that the law benefits all religions and thus breaches the wall of separation between church

and state, the fact that some benefit may incidentally accrue to religion is immaterial from the constitutional point of view if the statute has for its purpose a legitimate objective within the scope of the police power of the State (*Everson* v. *Board of Education*, 330 U. S. 1; *Cochran* v. *Louisiana State Board*, 281 U. S. 370; *Bradfield* v. *Roberts*, 175 U. S. 291; *People* v. *Friedman*, 302 N. Y. 75, appeal dismissed for want of substantial Federal question, 341 U. S. 907). Cases such as *People ex rel. McCollum* (333 U. S. 203) and *Cantwell* v. *Connecticut* (310 U. S. 296) are not to the contrary. The former case dealt with the use of state property for religious purposes (*Zorach* v. *Clauson*, 302 N. Y.), while the latter held (p. 305) that "a censorship of religion as the means of determining its right to survival is a denial of liberty protected by the" First and Fourteenth Amendments. Yet even in those cases it was recognized that the States may validly regulate the manner of expressing religious views if the regulation bears reasonable relation to the public welfare. Freedom to believe—or not to believe—is absolute; freedom to act is not. "Conduct remains subject to regulation for the protection of society" (*Cantwell* v. *Connecticut*, *supra*, at p. 304; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 393).

The statute now before us is clearly directed to the promotion of the public welfare, morals, public peace and order. These are the traditionally recognized objects of the exercise of police power. For this reason, any incidental benefit conferred upon religion is not sufficient to render this statute unconstitutional. There is here no regulation of religion, nor restriction thereof or other interference with religious beliefs except insofar as the picture itself does so, nor is there any establishment of religion or preference of religion or use of state property or funds in aid of religion. There is nothing more than a denial of the claimed right to hurl insults at the deepest and sincerest religious beliefs of others through the medium of a commercial entertainment spectacle.

We are essentially a religious nation (*Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 465), of which it is well to be reminded now and then, and in the *McCollum*

case (*supra*) the Supreme Court paused to note that a manifestation of governmental hostility to religion or religious teachings "would be at war with our national tradition" (at p. 211). The preamble to our State Constitution expresses our gratitude as a people to Almighty God for our freedom. To say that government may not intervene to protect religious beliefs from purely private or commercial attacks or persecution, whatever the underlying motive, and however skillfully accomplished, as distinguished from the assertion of conflicting beliefs, is to deny not only its power to keep the peace, but also the very right to "the free exercise" of religion, guaranteed by the First Amendment. The offering of public gratuitous insult to recognize religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose. Insult, mockery, contempt and ridicule can be a deadly form of persecution —often far more so than more direct forms of action. The prohibition of such conduct comes within the legitimate sphere of State action, and this State has recognized this principle, not only in the Education Law but in other respects as well (see, e. g., Penal Law, art. 186; Civil Rights Law, art. 4). We are not aware that this power has ever been even impliedly denied to the States.

This nation is a land of religious freedom; it would be strange indeed if our Constitution, intended to protect that freedom, were construed as an instrument to uphold those who publicly and sacrilegiously ridicule and lampoon the most sacred beliefs of any religious denomination to provide amusement and for commercial gain.

For the foregoing reasons, we conclude that the challenged portion of the statute in no way violates the provisions of the First Amendment relating to religious freedom.

Fifth: Petitioner finally argues that the statute is unconstitutional *in toto*; that motion pictures are to be treated as the press generally, and may not be subjected to censorship or prior restraint. While it may not be heard in this respect, inasmuch as it has sought and obtained benefits under the statute, and even now seeks to retain the licenses

granted (*Fahey* v. *Mallonee*, 332 U. S. 245, 255; *Shepherd* v. *Mount Vernon Trust Co.*, 269 N. Y. 234, 244-247), we shall dispose of this argument upon the merits.

The contention urged is made in the face of direct holdings to the contrary (*Mutual Film* cases, *supra; RD-DR Corp.* v. *Smith*, 183 F. 2d 562, cert. den. 340 U. S. 853; *Pathe Exchange, Inc.* v. *Cobb*, 202 App. Div. 450, affd. 236 N. Y. 539; 64 A. L. R. 505).

The rationale of these decisions is that motion pictures are primarily a form of entertainment, a spectacle or show, and not such vehicles of thought as to bring them within the press of the country. On this basis, petitioner's contention that the *Mutual* cases lack authority today, because it was not the Federal Constitution against which the statute was there tested, is unsound, for the Ohio Constitution guarantees free speech and a free press as does the Federal Constitution. Essentially, what petitioner would have us do is to predict that the Supreme Court will overrule the *Mutual* cases and so disregard them here, as well as our own holding in the *Pathe* case. But such was the position squarely taken in the *RD-DR* case, where the same arguments were presented as are here urged, and they were unquivocally rejected.

On the same footing is the contention that technical developments have made a difference in the essential nature of motion pictures since the *Mutual* decisions. Such development was foreseen in the *Mutual* cases (see p. 242), and was realized at the time of the *RD-DR* case (p. 565), decided a year ago. We have already pointed out that scientific and educational films, among others of kindred nature, are not within the general licensing statute, and are thus not concerned with any problem that might be raised by an attempt to impose general censorship upon such films.

Some comfort is found by petitioner in a statement in *United States* v. *Paramount Pictures, Inc.* (334 U. S. 131, 166) to the effect that "moving pictures, like newspapers and radio, are included in the press". That was an anti-trust case, freedom of the press was not involved, and the statement was pure dictum. Moreover, it may be observed that when certiorari was sought in the *RD-DR* case, it was

denied by the same court; the only Justice voting to grant was the one who wrote that dictum. Were we to rely upon dictum, the concurring remarks of Mr. Justice Frankfurter in a subsequently decided free speech case (*Kovacs* v. *Cooper*, 336 U. S. 77, at p. 96), would be appropriate: "Movies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated." (Citing the *Mutual* cases.) However, dictum is a fragile bark in which to sail the constitutional seas.

The fact is that motion pictures do create problems not presented by other media of communication, visual or otherwise, as already indicated. It should be emphasized, however, that technical developments which increase the force of impact of motion pictures simply render the problem more acute. It does not avail to argue that there is now greater ability of transmission, when it is precisely that ability which multiplies the dangers already inherent in the particular form of expression.

Whether motion pictures are *sui generis* or a very special classification of the press becomes a question for the academicians, once it is recognized that there is a danger presented and met by legislation appropriate to protect the public safety, yet narrow enough as not otherwise to limit freedom of expression. If there is any one proposition for which the free speech cases may be cited from *Schenck* v. *United States* (249 U. S. 47) to *Dennis* v. *United States*, and *Breard* v. *Alexandria*, decided June 4, 1951, it is that freedom of speech is not absolute, but may be limited when the appropriate occasion arises. We are satisfied that the dangers present and foreseen at the time of the *Mutual Film* cases are just as real today.

The order of the Appellate Division should be affirmed, with costs.

Desmond, J. (concurring). I concur for affirmance for these reasons: 1. It is not too clear from the statutes, that the Legislature, transferring (by L. 1926, ch. 544) motion picture licensing from an independent State Motion Picture Commission to a new motion picture division in the State Department of Education intended, without so saying, that

the Board of Regents, as head of the education department, should have power to revoke a license granted by the division. However, there is general language in the statute (Education Law, § 132) empowering the Regents to enforce the licensing law, including its prohibition against the licensing of "obscene, indecent, immoral, inhuman, sacrilegious" films (Education Law, § 122), and it would be an improbably legislative intent that would leave all this solely to a division of the department, with no corrective authority available elsewhere in the State government. It would be anomalous if the Regents, charged by the statute with enforcing the law, could not correct the errors of their subordinate body.

2. As to whether this film can be considered sacrilegious, our own jurisdiction is limited by the *Miller* v. *Kling* (291 N. Y. 65) rule which requires us to uphold the administrative body's decision if supported by substantial evidence. In other words, if reasonable men could regard the picture as sacrilegious, then we cannot say that the Regents' ruling is wrong as matter of law. Reasonable, earnest and religious men in great numbers have said so, although other earnest religious voices express the other view. There was thus fair basis for the Regents' holding.

3. "Sacrilegious", like "obscene" (see *Winters* v. *New York*, 333 U.S. 507), is sufficiently definite in meaning to set an enforcible standard. That men differ as to what is "sacrilegious" is beside the point—there is nothing in the world which all men everywhere agree is "obscene", yet obscenity laws are universally enforced. Of course, some of the meanings of "sacrilegious" have no possible application to a motion picture, but, according to all the dictionaries and common English usage, the adjective has one applicable meaning, since it includes violating or profaning anything held sacred (see 8 Oxford Dictionary, pp. 18-19; Webster's New Int. Dictionary [2d ed.], unabridged, p. 2195; Black's Law Dictionary, [de luxe ed.], p. 1574). We thus have a statutory term of broad but ascertainable meaning, and, by settled law, the administrative application thereof must be accepted by the courts "if it has 'warrant in the record' and a reasonable basis in law." (*Matter of*

Mounting & Finishing Co. v. *McGoldrick*, 294 N. Y. 104, 108; *Red Hook Cold Storage Co.* v. *Dept. of Labor*, 295 N. Y. 1, 9).

4. Motion pictures are, it would seem, not excluded from First Amendment coverage (*United States* v. *Paramount Pictures*, 334 U.S. 131, 166) but, since there was a reasonable ground for holding this film "sacrilegious" (in the meaning which the Legislature must have intended for that term), the film was constitutionally "subject to control" (*Ex parte Jackson*, 96 U.S. 727, 736, cited in *Winter* v. *New York*, *supra*). It fell within the "well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem" (*Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571, 572—italics mine). The *Chaplinsky* decision says that these narrowly limited classes of constitutionally preventible utterances include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." That covers this case, and should dispose of any claim of violation of the First Amendment. If not, then any prior censorship at all of any motion picture is unconstitutional, and the floodgates are open.

Fuld, J. (dissenting). It may lend perspective to recall that we are here concerned with a motion picture that has passed the rigid scrutiny of a numerous array of critics of undenied religiousness. There is, of course, no suggestion that "The Miracle" is a product of heathen lands. The story was written by a Roman Catholic and the picture produced, directed and acted solely by Roman Catholics. It was filmed in Italy, and first exhibited in Rome, where religious censorship exists. There, the Vatican newspaper, *L'Osservatore Romano*, weighed its artistry without registering the slightest doubt as to its piety. Then it passed the United States Customs with no voice raised against it.

In 1949 and again in 1950, successive directors of the motion picture division of the State Education Department licensed the film for statewide exhibition. It won the approval of the National Board of Review of Motion Pic-

tures. It drew general acclaim from the press and was designated, as part of a trilogy, the best foreign language film of 1950 by the New York Film Critics, an association of critics of the major metropolitan newspapers. Finally, one important Roman Catholic publication, after deploring "these highly arbitrary invocations of a police censorship," noted that the film "is not *obviously* blasphemous or obscene, either in its intention or execution" (*The Commonweal*, March 16, 1951, pp. 567-568; also, March 2, 1951, pp. 507-508), and all Protestant clergymen who expressed themselves publicly—and they constituted a large number representing various sects—found nothing in the film either irreverent or irreligious.

However, as Judge FROESSEL reminds us, the contrary opinion also found strong voice, eventually reaching the ears of the board of regents. After viewing the film, that body revoked and rescinded the license—some two years after it had been granted—invoking as authority therefor section 122 of the Education Law. That statute provides that the motion picture division shall license each moving picture submitted to it unless it is "obscene, indecent, immoral, inhuman or sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime." The board of regents decided that the film is "sacrilegious," and its decision was confirmed by the Appellate Division.

Laying to one side for the moment the question as to the constitutionality of a statute which sanctions the banning of a moving picture on the ground that it is "sacrilegious", I am of opinion that the regents' action was without legislative warrant.

The controlling statute, the Education Law, is significant both for what it says and for what it leaves unsaid. In section 124, entitled "Review by Regents," the legislature expressly gave the regents power to review a determination of the motion picture division *denying* a license—but it conferred no similar power to review the division's *granting* of a license. By settled rules of construction, that deliberate omission by the legislature clearly indicates that no such authority was intended (see e.g., Sutherland, *Statutes*

and Statutory Construction [3d ed. 1943] §§4915-4917). And the more one searches the statute, the more clearly does that appear. For example, the statute expressly authorizes the regents to revoke a permit issued for the exhibition of a scientific or educational film (§125) and to revoke a motion picture license if it was obtained on a false application or if the licensee tampered with the film or if there is a "conviction for a crime committed by the [film's] exhibition or unlawful possession" (§128). But nowhere in the statute is there to be found any general grant of power to the regents to revoke a previously issued license. This omission is also to be contrasted with the further and explicit grant of such a power or revocation by the same Education Law as regards many other types of licenses issued by the Education Department (See, e.g., §6514 [as to doctors]; §6613 [as to dentists]; §6712 [as to veterinarians]; §6804 [as to pharmacists]; §7108 [as to optometrists]; §7210 [as to engineers]; §7308 [as to architects]; §7406 [as to certified public accountants]; §7503 [as to shorthand reporters].) Clearly, the legislature knew how to bestow the power of revocation when that was its purpose.

Even more recent evidence of the legislature's design is at hand. In 1950, the legislature amended the Penal Law to prohibit prosecution, on the ground of obscenity, of a film licensed under the Education Law (Laws 1950, ch. 624, amending Penal Law, §1141). That enactment was inspired by *Hughes Tool Co.* v. *Fielding* (297 N.Y. 1024, affg. 272 App. Div. 1048, affg. 188 Misc. 947). It has there been held that such a criminal prosecution was permissible *because* the Education Law neither provided for nor allowed any direct review by the regents or the courts of a decision of the motion picture division issuing a license. If the legislature had disagreed with that interpretation of the Education Law—clearly indicated at Special Term (188 Misc., at p. 952)—it would undoubtedly have amended the Education Law, not the Penal Law. By depriving the state of the power to prosecute the exhibition of a film once it receives a license, the legislature affirmed, as clearly as it could, that the granting of a license is an act of such im-

placable finality that it may not be challenged collaterally in a criminal prosecution any more than directly in a civil proceeding.

The legislative scheme so clearly expressed, the board of regents may neither rely upon its status as head of the Education Department to reverse decisions of a subordinate which are not the result of illegality, fraud or vital irregularity (see, e.g., *Butterworth* v. *Hoe*, 112 U.S. 50, 56, 64; cf *People ex rel. Finnegan* v. *McBride*, 226 N.Y. 252, 257; *People ex rel. Chase* v. *Wemple*, 144 N.Y. 478, 482; *Matter of D. and D. Realty Corp.* v. *Coster*, 277 App. Div. 668)[1] nor draw from section 132 of the Education Law—which in overall manner gives the board "authority to enforce the provisions and purposes of part two of this article"—an assumption of authority to "review" and revoke the grant of a license by the motion picture division. All that section 132 was designed to do, and all that it does, is to authorize enforcement. To construe its general language as authorizing review of the granting of a license is to stretch language beyond all permissible limits and to render superfluous and meaningless the very explicit language of section 124 permitting such review only where a license has been denied.

"A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration. A power not expressly granted by statute is implied only where it is 'so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the legislature. The implied power must be necessary, not merely convenient, and the intention of the legislature must be free from doubt.' (*People ex rel. City of Olean* v. *W.N.Y. & P.T. Co.*,

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[1] There is no substance to the regents' claim that they were merely correcting the "illegal" action of the motion picture division in licensing a "sacrilegious" picture. Since obviously there was at least reasonable doubt as to whether the film was "sacrilegious", the decision of the motion picture division could not be condemned as "illegal."

214 N.Y. 526, 529). *Lawrence Constr. Corp.* v. *State of New York*, 293 N.Y. 634, 639).

So, here, the regents' contention that they *must* have power to review and revoke in order to guard against error by the motion picture division in granting licenses, is not persuasive. The fact is that, in the twenty-five years during which the motion picture division has been in the Department of Education, the regents have never before reviewed the grant of a license or even suggested the existence of such a power. Limited as we are to a determination of what the legislature has done, the argument of alleged necessity has no weight in the face of this long-continued practical construction. For this court now to read into the statute a provision which that body chose not to write into it would constitute an uncalled-for intrusion into the sphere of the legislature.

Even if I were to assume, however, that the statute does confer a power to review and revoke, I would still conclude for reversal. In my view, that portion of the statute here involved must fall before the constitutional guarantee that there be freedom of speech and press. The early decision of *Mutual Film Corp.* v. *Ohio Indus'l Comm.*, 236 U.S. 230, is urged as conclusively establishing that motion pictures are not within the First Amendment's coverage or protection. The consistent course of decision by the Supreme Court of the United States in recent years, however, persuades me that that early decision no longer has the force or authority here claimed for it.

We are confronted in this case with censorship in its baldest form—a licensing system requiring permission in advance for the exercise of the right to disseminate ideas *via* motion pictures, and committing to the licensor a broad discretion to decide whether that right may be exercised. Insofar as the statute permits the state to censor a moving picture labelled "sacrilegious," it offends against the First and Fourteenth Amendments of the Federal Constitution, since it imposes a prior restraint—and, at that, a prior restraint of broad and un-defined limits—on freedom of discussion of religious matters. And, beyond that, it may well be that the restraint on the "sacrilegious" constitutes

an attempt to legislate orthodoxy in matters of religious belief, contrary to the First Amendment's prohibition against laws "respecting an establishment of religion." (Cf. *Everson* v. *Board of Education*, 330 U.S. 1, 15; *Illinois, ex rel. McCollom* v. *Board of Education*, 333 U.S. 203, 210).

The freedoms of the First Amendment are not, I appreciate, absolute, although they are as near to absolutes as our judicial and political system recognizes. But insofar as these freedoms are qualified, the qualification springs from the necessity of accommodating them to some equally pressing public need. Thus, some limited measure of restraint upon freedom of expression may be justified where the forum is the public street or the public square, where the audience may be a "captive" one, and where breaches of the peace may be imminent as the result of the use, or rather the abuse, of fighting words (Cf. *Dennis* v. *United States*, 341 U.S. 494, 503, et seq.; *Feiner* v. *New York*, 340 U.S. 315, 319; *Niemotko* v. *Maryland*, 340 U.S. 268; *Terminiello* v. *Chicago*, 337 U.S. 1; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572; *Cantwell* v. *Connecticut*, 310 U.S. 296, 308; *Schneider* v. *State*, 308 U.S. 147, 160). Here, there is no "captive" audience; only those see the picture who wish to do so, and, then, only if they are willing to pay the price of admission to the theatre. Moreover, if subject matter furnishes any criterion for the exercise of a restraint, I know of no subject less proper for censorship by the state than the one here involved.

The Supreme Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places" (*Kunz* v. *New York*, 340 U.S. 290, 294; see, also, *Niemotko* v. *Maryland, supra*, 340 U.S. 268; *Saia* v. *New York*, 334 U.S. 558; *Cantwell* v. *Connecticut, supra*, 310 U.S. 296; *Hague* v. *C.I.O.*, 307 U.S. 496; *Lovell* v. *Griffin*, 303 U.S. 444). "The State cannot of course forbid public proselyting or religious argument merely because public officials disapprove the speaker's views. It must act in patent good faith to maintain the public peace, to assure the availability of the streets for their primary purposes of passenger and ve-

hicular traffic, or for equally indispensable ends of modern community life" (see *Niemotko* v. *Maryland*, *supra*, 340 U.S. 268, 282, per FRANKFURTER, J., concurring).

Invasion of the right of free expression must, in short, find justification in some overriding public interest, and the restricting statute must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Feiner* v. *New York*, *supra*, 340 U.S. 315, 319; *Niemotko* v. *Maryland*, *supra*, 340 U.S. 268; *Winters* v. *New York*, 333 U.S. 507, 509; *Cantwell* v. *Connecticut*, *supra*, 310 U.S. 296, 307-308; *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98, 105). The statute before us is not one narrowly drawn to meet such a need as that of preserving the public peace or regulating public places. On the contrary, it imposes a general and pervasive restraint on freedom of discussion of religious themes in moving pictures, which cannot be justified on the basis of any substantial interest of the state (Cf. *Kunz* v. *New York*, *supra*, 340 U.S. 290; *Dennis* v. *United States*, *supra*, 341 U.S. 494, 508-509).

Over a century ago, the Supreme Court declared that "the law knows no heresy and is committed to the support of no dogma * * *." (*Watson* v. *Jones*, 80 U.S. 679, 728). Just as clearly, it is beyond the competency of government to prescribe norms of religious conduct and belief. That follows inevitably from adherence to the principles of the First Amendment. "In the realm of religious faith, and in that of political belief," it has been said (*Cantwell* v. *Connecticut*, *supra*, 310 U.S. 296, 310), "sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

The inherent indefinability, in its present context, of the term "sacrilege" is apparent upon the merest inquiry.

At what point, it may be asked, does a search for the eternal verities, a questioning of particular religious dogma, take on the aspect of "sacrilege?" At what point does expression or portrayal of a doubt of some religious tenet become "sacrilegious"? Not even authorities or students in the field of religion will have a definitive answer, and certainly not the same answer. There are more than two hundred and fifty different religious sects in this country, with varying religious beliefs, dogmas and principles (See *Illinois ex rel. McCollum* v. *Board of Education*, *supra*, 333 U.S. 203, 227, per FRANKFURTER, J., concurring). With this great contrariety of religious views, it has been aptly observed that one man's heresy is another's orthodoxy, one's "sacrilege," another's consecrated belief. How and where draw the line between permissible theological disputation and "sacrilege?" What is orthodox, what sacrilegious? whose orthodoxy, to whom religious? In the very nature of things, what is "sacrilegious," will of necessity differ with the philosophy, the training, the education and the background of the particular censor of the moment, the determination whether a film is "sacrilegious" or not, must necessarily rest in the undiscoverable recesses of the official's mind.

Any possible doubt that the term is essentially vague is dispelled by a reference to the variant and inconsistent definitions ascribed to it by the board of regents and by the Appellate Division and Judge FROESSEL.

Thus, the regents, frowing upon the dictionary definition as "technical,"[2] nevertheless assure us that "everyone knows what is meant by this term" and, by way of demonstrating that fact, proceed to define the word as describing a film which "affronts a *large segment* of the population"; offends the sensibilities by ridiculing and burlesquing anything "held sacred by the *adherents of a particular religious faith*"; is "offensive to the religious sensibilities

[2] A typical definition of "sacrilege" is that found in Webster's New International Dictionary [2d ed., 1948]: "the crime of stealing, misusing, violating or desecrating that which is sacred, or holy, or dedicated to sacred used." (See, also, the New Catholic Dictionary [Vatican ed., 1929]).

of any element of society." Indeed, any semblance of either general meaning or specific content is, I suggest, abandoned by the regents themselves when they assert that, since "anything is only sacrilegious to those persons who hold the concept sacred" the opinions of non-believers are "worthless." By such reasoning, the adherents of a particular dogma become the only judges as to whether that dogma has been offended! And, if that is so, it is impossible to fathom how any governmental agency such as the board of regents, composed as it is of laymen of different faiths, could possibly discharge the function of determining whether a particular film is "sacrilegious."

Judge FROESSEL and the Appellate Division state that the statutory proscription against the "sacrilegious" is intended to bar any "visual caricature of religious beliefs held sacred by one sect or another" (opinion of FROESSEL, J., p. 12). Though Judge FROESSEL also defines "sacrilegious" in terms of "attacking" or "insulting" religious beliefs or treating them with "contempt, mockery, scorn and ridicule"—all words of ephemeral and indefinite content—the basic criterion appears to be whether the film treats a religious theme in such a manner as to offend the religious beliefs of any group of persons. If the film does have that effect, and it is "offered as a form of entertainment," it apparently falls within the statutory ban regardless of the sincerity and good faith of the producer of the film, no matter how temperate the treatment of the theme, and no matter how unlikely a public disturbance or breach of the peace.

The drastic nature of such a ban is highlighted by the fact that the film in question makes no direct attack on, or criticism of, any religious dogma or principle, and it is not claimed to be obscene, scurrilous, intemperate or abusive. Nor is there any evidence of any malicious purpose or intention on the part of the producers of the film to revile or even attack Catholic doctrine or dogma, nor any suggestion of any reasonable likelihood of a breach of the peace resulting from the film's exhibition. So broad, indeed, is the suggested criterion of "sacrilege" that it might be applied to any fair and temperate treatment of a psycho-

logical, ethical, moral or social theme with religious overtones which some group or other might find offensive to its "religious beliefs."

It is claimed that "the courts have had no problem either with the word 'sacrilegious' or with its synonym, 'profane'" (Opinion of FROESSEL, J., *supra*, p. 9). The cases to which reference is made, however, involved neither the "profane" in religion nor the "sacrilegious," and the simple fact is that the Supreme Court has never had occasion to pass upon either the one term or the other. The context in which the word "profane" appears in the cases cited (*Winters* v. *New York, supra*, 333 U.S. 507, 510; *Chaplinsky* v. *New Hampshire, supra*, 315 U.S. 568, 572), as well as the authorities there relied upon (*Cantwell* v. *Connecticut, supra*, 310 U.S. 296, 309-310; *Chafee, Free Speech in the United States* [1941] pp. 149-150), make it evident that the term was used, not as a synonym for "sacrilegious," but as a substitute for "epithets or personal abuse," for swear words and for the other "insulting or 'fighting' words," which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" and "are no essential part of any exposition of ideas" (*Chaplinsky* v. *New Hampshire, supra*, 315 U.S. 568, 572; see, also, *Cantwell* v. *Connecticut, supra*, 310 U.S. 296, 310; *Chafee, op cit.*, p. 150). In short, the cases cited have nothing whatsoever to do with the "profane" in religion, and the judges who sat in them were not called upon to give the slightest thought or consideration to the subject with which we are now concerned.

The shortcomings of ambiguous epithets as rigid boundaries for free expression are great enough in temporal and political matters (cf. e.g., *Winters* v. *New York, supra*, 333 U.S. 507; *Dennis* v. *United States, supra*, 341 U.S. 494; *Jordan* v. *De George*, 341 U.S. 223; *Musser* v. *Utah*, 333 U.S. 95), but they are all the greater when the epithets trench upon areas of religious belief (see, e.g., *Kunz* v. *New York, supra*, 340 U.S. 290; *Saia* v. *New York, supra*, 334 U.S. 558, 567; *Cantwell* v. *Connecticut, supra*, 310 U.S. 296). Indeed, the Supreme Court has gone so far as to hold that the First Amendment's guarantee forbids prior restraint of public discussion that even "ridicules" or "denounces" any form

of religious belief. (See *Kunz* v. *New York*, supra, 340 U.S. 290, and see, particularly, concurring opinion of FRANKFURTER, J., reported in 340 U.S. at pp. 285, 286). In a free society "all sects and factions, as the price of their own freedom to preach their views, must suffer that freedom in others." (*Kunz* v. *New York*, *supra*, 340 U.S. at p. 301, per JACKSON, J., dissenting; see also, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 116).

Were we dealing with speeches, with handbills, with newspapers or with books, there could be no doubt as to the unconstitutionality of that portion of the statute here under consideration. The constitutional guarantee of freedom of expression, however, is neither limited to the oral word uttered in the street or the public hall nor restricted to the written phrase printed in newspaper or book. It protects the transmission of ideas and beliefs, whether popular or not, whether orthodox or not. A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the "airborne voice," the printed word or the "still" picture, it is put forward by a "moving" picture. The First Amendment does not ask whether the medium is visual, acoustic, electronic or some yet unheard-of device. It has readily accommodated itself to other products of inventive genius, to other advances in technology, such as the radio and television. If "The Constitution deals with substance, not shadows," if "Its inhibition was levelled at the thing, not the name" (*Cummings* v. *Missouri*, 4 Wall. 277, 325), then surely, its meaning and vitality are not to be conditioned upon the mechanism involved. Of course, it may well be that differences in medium will give rise to different problems of accommodation of conflicting interests (See *Kovacs* v. *Cooper*, 336 U.S. 77, 96, per FRANKFURTER, J., concurring). But any such accommodation must necessarily be made in the light of fundamental constitutional safeguards.[3]

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[3] Whether, for instance, the statute (Education Law, §122) may be sustained as valid even as a censorship measure insofar as its criterion is the narrow one of "obscenity," is not of course, before us and need not be considered (Cf. *Chaplinsky* v. *New Hampshire*, *supra*, 315 U.S. 568, 572; *Near* v. *Minnesota*, 283 U.S. 697; *Ex parte Jackson*, 96 U.S. 727, 736).

One reason for denying free expression to motion pictures, we are told, is that the movies are commercial. But newspapers, magazines and books are likewise commercially motivated, and that has never been an obstacle to their full protection under the First Amendment (See, e.g., *Grosjean v. American Press Co.*, 297 U.S. 233). Again, it is said, the fact that the moving picture conveys its thought or message in dramatic episodes or by means of a story or in a form that is entertaining, makes the difference. But neither novels, magazines nor comic books are made censorable because they are designed for entertainment or amusement. (See, e.g., *Winters v. New York*, *supra*, 333 U. S. 507, 510; *Hannegan v. Esquire, Inc.*, 327 U. S. 146, 153). The Supreme Court made that plain in the *Winters* case, when it declared: "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." (333 U.S. at p. 510).

Whatever may have been true thirty-six years ago when the *Mutual Film case*, *supra*, 236 U. S. 230, was decided, there is no reason today for casting the motion picture beyond the barriers of protected expression. Learned and thoughtful writers so opine (see Chafee, *Free Speech in the United States* [1942], pp. 544 et seq.; Ernst, *The First Freedom*, p. 268; Kupferman & O'Brien, *Motion Picture Censorship*, 36 Cornell Law Quart. 273; Note, 60 Yale Law Journ. 696; Note, 49 Yale Journ. 87), and the Supreme Court itself has recently so declared (See *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 166; see, also, *Kovacs v. Cooper*, *supra*, 336 U. S. 77, 102, per Black, J., dissenting). As Chafee put it (op. cit., p. 545), "In an age when 'commerce' in the Constitution has been construed to include airplanes and electromagnetic waves, 'freedom of speech' in the First Amendment and 'liberty' in the Fourteenth should be similarly applied to new media for the

communication of ideas and facts. Freedom of speech should not be limited to the air-borne voice, the pen, and the printing press, any more than interstate commerce is limited to stagecoaches and sailing vessels." And, wrote the Supreme Court (*United States v. Paramount Pictures, Inc., supra*, 334 U. S. 131, 166), "We have no doubt that moving pictures, like newspapers and radio are included in the press whose freedom is guaranteed by the First Amendment."

Every consideration points that conclusion. The *Mutual Film* case should be relegated to its place upon the history shelf. Rendered in a day before the guarantees of the Bill of Rights were held to apply to the states, and when moving pictures were in their infancy, the decision was obviously a product of the view that motion pictures did not express or convey opinions or ideas. Today, so far have times and the films changed, some would deny protection for the opposite reason, for the reason that films are too effective in their presentation of ideas and points of view. The latter motion is as unsupportable as the other and antiquated view; that the moving picture is a most effective mass medium for spreading ideas is, of course, no reason for refusing it protection. If only ineffectual expression is shielded by the Constitution, free speech becomes a fanciful myth. Few would dispute the anomaly of a doctrine that protects as freedom of expression comic books that purvey stories and pictures of "bloodshed and lust" (see *Winters v. New York, supra*, 333 U. S. 507, 510), light and racy magazine reading (see *Hannegan v. Esquire, Inc., supra*, 327 U. S. 146, 153) and loudspeaker harangues (see *Saia v. New York, supra*, 334 U. S. 558), and yet denies that same protection to the moving picture.

Sincere people of unquestioned good faith may, as in this case, find a moving picture offensive to their religious sensibilities; but that cannot justify a statute which empowers licensing officials to censor the free expression of ideas or beliefs in the field of religion. "If there is any fixed star in our constitutional constellation," the Supreme Court has said (*Board of Education v. Barnette*, 319 U. S. 624, 642), "it is that no official, high or petty, can prescribe what shall

be orthodox in politics, nationalism, religion or other matters of opinion * * * ".

The order of the Appellate Division should be reversed and the determination of the board of regents annulled.

LOUGHRAN, Ch. J., LEWIS and CONWAY, JJ., concur with FROESSEL, J.; DESMOND, J., concurs in separate opinion; FULD, J., dissents in opinion in which DYE, J., concurs.

Order affirmed.

EXHIBIT B

Opinion of Appellate Division

FOSTER, P. J.:

This is a proceeding under Article 78 of the Civil Practice Act to review a determination of the Board of Regents of the University of the State of New York which rescinded licenses for the public exhibition of a motion picture film, entitled "The Miracle," on the ground it is sacrilegious.

The picture, produced in Italy, depicts a demented peasant girl tending a herd of goats on a mountainside. A bearded stranger appears, garbed in a dress reminiscent of Biblical times. She imagines him to be St. Joseph, and that he has come to take her to heaven. While she babbles about this he says nothing, but plies her with wine, and the implication is left that he seduces her. Later, when her pregnancy becomes known to the villagers, they mock her and place a basin on her head in imitation of a halo. She exclaims at one point as to her pregnancy, "It's the grace of God." She leaves the village to take refuge in a cave, and finally gives birth to a child in the basement of a church which stands on a high hill.

According to the English dialogue, in her babbling to the bearded stranger, she makes these statements: "I'm not well * * * And taking a loaf of bread, he broke it * * * And an Angel of the Lord appeared in his dream and said * * * Joseph, * * * Son of David * * * Have no fear to take Mary as your bride * * * for what has been

conceived here * * * St. Joseph * * * Cast aside my body and my soul * * * I'd feel so happy without this weight * * * St. Joseph has come to me * * * What Heaven * * Heaven on earth * * * The mad woman has received grace."

On March 2, 1949, the motion picture division of the State Education Department issued a license for the picture with Italian dialogue. Apparently it was never shown pursuant to this license. On November 30, 1950, it was again licensed as a part of a trilogy entitled "Ways of Love," with an English dialogue. After it had been publicly shown under this license the Board of Regents received many protests against its exhibition on the plaint that it was sacrilegious. A committee of the Regents was requested to view the picture, and after it had reported there was a basis for the claim that the picture was sacrilegious the Commissioner of Education issued an order requiring the licensees of the film to show cause at a hearing before the same committee why the licenses should not be revoked.

At the hearing before the committee, petitioner, who was the holder of the license last issued, appeared specially and challenged the Regent's authority to proceed in the matter on the theory that it had no power of review under the statute as to a license once issued. The committee reported that in its opinion the Regents had authority to consider whether the film was licensed illegally or not, and recommended that the Board of Regents, as a committee of the whole, view the picture. This action was taken, and after due consideration the Board found the picture to be sacrilegious, and voted to rescind the licenses therefor on February 16, 1951.

Overshadowing all other arguments petitioner contends on this review that censorship of sound motion pictures is unconstitutional as a previous restraint on freedom of speech and freedom of the press, in violation of the First and Fourteenth Amendments to the Constitution of the United States and to Section 8 of Article 1 of the Constitution of the state. We do not regard such an issue as an open one in this court. Motion pictures have been judicially declared to be entertainment spectacles, and not a part of

the press or organs of public opinion; and hence subject to state censorship (*Mutual Film Corporation v. Ohio Indemnity Co.*, 236 U. S. 230). This Court has upheld the power of the state to censor motion pictures (*Pathe Exchange, Inc., v. Cobb*, 202 App. Div. 450), a decision which was affirmed by the Court of Appeals (236 N. Y. 539). Strong criticism has been voiced against the distinctions made between movie films and freedom of expression otherwise guaranteed (Cornell Law Quarterly, Vol. 36, No. 2, p. 273); and some dicta would seem to indicate a change of viewpoint (*United States v. Paramount Pictures*, 331 U. S. 136, 166). But despite the enlarged scope of motion pictures as a medium of expression in recent years, and the addition of sound dialogue, the latest authoritative judicial expression which bears directly on the subject still recognizes the distinction (*Rd-Dr Corporation, et al., v. Smith*, 183 Fed. Reporter [2nd series] 562; certiorari denied 340 U. S. 853). In view of this situation it is not appropriate for us, as an intermediate court, to re-examine the issue.

In addition to arguing against the principle of censorship generally, petitioner also argues that Section 122 of the Education Law, which bars the licensing of a motion picture deemed sacrilegious, is an unconstitutional exercise of legislative power. This argument proceeds on the theory that no thing can be deemed sacrilegious as applied to a motion picture without impinging on the constitutional guaranty of freedom of religion. Petitioner cites the fact that what may be sacrilegious to one group of citizens may not be so as to other groups; and hence it reasons that no enforcible meaning can be given to the term for the purpose of censorship. The Board of Regents based its revocation solely on the ground that the picture is sacrilegious; that it parodies in effect the Immaculate Conception and the Divine Birth of Christ as set forth in the New Testament. By millions of Christians these doctrines are held sacred, and any profanation thereof regarded as a sacrilege. Concededly there are other groups who do not accept these beliefs. May the state bar on the ground of sacrilege a motion picture that profanes the religious beliefs of one group, however large, when the profanation is not common

and universal to all groups? Assuming the validity of the distinction we have already noted between motion pictures and other organs of expression we think the answer to this question lies in the affirmative.

The term "sacrilege," according to modern semantics, means the violation or profanation of sacred things. It is derived from the Latin word "sacrilegium," which originally meant the theft of sacred things, but its meaning has since been widely extended. Even as far back as Cicero's time it had grown in popular speech to include any insult or injury to things deemed sacred, Encyclopaedia Britannica, Vol. 19, p. 803). Obviously the legislature used the term in its widest sense, and we think it was intended to apply to all recognized religions, not merely to one sect alone. Any construction which denoted a preference for one sect would be inconsistent with the constitutional mandate of complete separation between church and state. Support for this view may be found in another field. For instance, it is a criminal offense in this state to present an exhibition in which there shall be a living character representing the deity of any known religion (Penal Law, Section 2074). In a sense this statute also impinges on freedom of expression so far as religion is concerned, yet no one, that we can discover, has challenged the power of the state in the interests of public peace and order to enforce it. We think the state has the same power for the same reason to exercise a previous restraint as to motion pictures that may fairly be deemed sacrilegious to the adherents of any religious group. The exericse of such a power is directly related to public peace and order, and unless clearly in conflict with a constitutional prohibition it should not be denied.

We fail to see how such restraint can be construed as denying freedom of religion to anyone, or how it raises the dogma of any one group to a legal imperative above other groups. As we construe the statute all faiths are entitled to the same protection against sacrilege. This is not to say that full inquiry and free discussion, even to the point of attack, may not be had with regard to the doctrines of any religion, including Christianity, by those who are free-

thinkers and otherwise (*Commonwealth v. Kneeland*, 20 Pick. 206; *Cantwell v. Connecticut*, 310 U. S. 296). However motion pictures, staged for entertainment purposes alone, are not within the category of inquiry and discussion. A view of the picture in question would convince any reasonable mind that it was conceived and produced purely as an entertainment spectacle, and not as a vehicle for inquiry or discussion as to the merits of any religious dogma. The statute does not muzzle either free speech or a free press. All it purports to do is to bar a visual caricature of religious beliefs held sacred by one sect or another, and such a bar, in our opinion, is not a denial of religious freedom. It should be added in connection with this point that news films, scientific and educational films, are expressly exempted from censorship (Education Law, Section 123).

Aside from all this petitioner contends that the Board of Regents was without power to rescind a license granted by the motion picture division, because the statute does not expressly provide for a review by the Regents where a license is denied (Education Law, Section 124). The Regents take the view that in rescinding the licenses they were merely correcting the illegal acts of a subordinate body, and that as the head of the Department of Education and charged with the enforcement of censorship provisions of the statute they had the power to do so.

The motion picture division of the Department of Education is successor to the Motion Picture Commission, an independent body established in 1921 when the state first undertook the censorship of motion pictures. The latter was abolished in 1926 and its functions transferred to the Education Department (L. 1926, ch. 544). In 1927 the law was again revised and provided for the continuation of a motion picture division within the Education Department in language now contained in Section 120 of the present Education Law. This section provides in part:

> "There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commis-

sioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus or officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. * * *"

Section 121 of the same statute authorizes the Regents to establish offices and bureaus for the reception and examination of films.

Section 122 provides for censorship in these words:

> "The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, *sacrilegious*, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. * * *" (Italics supplied.)

Section 124 authorizes a review by the Regents, or a committee thereof, at the behest of an applicant in case a license is denied by the motion picture division.

Section 132, however, empowers the Board of Regents in the broadest of language to enforce the provisions and purposes of the entire article relating to the motion picture division.

These brief references to the statute clearly indicate that the motion picture division is a subordinate body of the Education Department under the control of the Board of Regents. We think it equally clear that the latter has the power to correct or rescind any illegal action taken by its motion picture division. If this is not so then the language of Section 132 of the statute must be held meaningless, for

one of the provisions and purposes of the statute is to prevent the licensing of a motion picture that is immoral or sacrilegious. If the motion picture division was an independent body, then undoubtedly the maxim cited by petitioner, "*expresio unius est exclusio alterius*," would apply; the grant of an express power to review in one case not specified. The subordinate position of the motion picture division and the supreme responsibility of the Regents to enforce the provisions and purposes of the statute preclude the application of the maxim here.

We may add that it seems most unlikely from a practical viewpoint that the legislature intended to leave the authorities helpless in a case where through some misconception or inadvertence on the part of the motion picture division a film was illegally licensed. Such would be the result, for instance, where an immoral picture happened to slip by the motion picture division through inadvertence or otherwise. In such a case it would have to be held, if petitioner is right, that the Regents could not correct the situation; and on the other hand, a criminal prosecution would be impossible because the film has been licensed (Penal Law, Section 1141). Such a stalemate would be repugnant to common sense, and every implication is against it. It furnishes ground for the belief that the legislature gave no specific grant of power to the Regents for a review when a license was granted because none was considered necessary; the power to correct was inherent in the statute.

There remains the issue as to whether the Regents acted arbitrarily and capriciously in the matter. Once the validity of the principle of censorship is admitted the issue in each case becomes one of judgment; in fact, that is one of the gravest arguments against the principle. The record before us indicates varying views as to whether the picture in question is so offensive to large groups within the Christian sect as to justify a finding that as to them it is sacrilegious. This conflict of views is proof that the issue is one of judgment to be resolved by the administrative body which has it in charge. The text and content of the picture itself, together with the complaints received, constituted substantial evidence upon which the Regents could act. Under the

familiar rule, applicable to all administrative proceedings, we may not interfere unless the determination made was one that no reasonable mind could reach. While some of us feel that the importance of the picture has been exaggerated we cannot justly say that the determination complained of was one that no reasonable mind would countenance.

The determination therefore should be confirmed with $50 costs and disbursements.

EXHIBIT C

New York State Education Law

Section 120. Motion Picture division continued; organization

There shall continue to be in the education department a motion picture division. The head of such division shall be a director, who shall be appointed by the regents, upon the recommendation of the commissioner of education. The regents may consolidate such division with the division of visual instruction or may assign to the motion picture division the functions, powers and duties of other divisions, bureaus of officers in the department. The board of regents, upon the recommendation of the commissioner of education, shall appoint such officers and employees as may be needed and prescribe the powers and duties and, within the limits of the appropriations made therefor, fix the compensation of such director, officers and employees. All expenses actually and necessarily incurred in the performance of their duties shall be allowed to such director, officers and employees.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 22.)

Section 122. Licenses

The director of the division or, when authorized by the regents, the officers of a local office or bureau shall cause to be promptly examined every motion picture film submitted

to them as herein required, and unless such film or a part thereof is obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor. If such director or, when so authorized, such officer shall not license any film submitted, he shall furnish to the applicant therefor a written report of the reasons for his refusal and a description of each rejected part of a film not rejected in toto.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 23.)

Section 129. Unlawful use or exhibition

It shall be unlawful to exhibit, or to sell, lease or lend for exhibition at any place of amusement for pay or in connection with any business in the state of New York, any motion picture film or reel, other than those specified in subdivision one of section one hundred twenty-three, unless there is at the time in full force and effect a valid license or permit therefor of the education department and unless such film or reel shall contain for exhibition upon the screen identification matter in the substance, style and length which such department shall prescribe.

This section shall not be construed to prohibit the making of an executory contract for the sale or leasing of a film or films, provided the film shall have been licensed under the provisions of part two of this article and the license seal attached at the time of delivery.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 30.)

Section 131. Penalty

A violation of any provision of part two of this article shall be a misdemeanor.

(Officially certified transcript printed in McKinney's Consolidated Laws of New York, volume 16, at p. 31.)